

reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the standard. 3 FMSHRC at 1553; 2 FMSHRC at 2122. The Commission noted that the specific purpose of § 57.15-5 is the prevention of falls. It ruled that by requiring positive means of protection whenever any danger of falling exists, the standard reasonably achieved its purpose of protecting all miners. Applying this rationale to the instant cases, I conclude that it is reasonable to apply § 75.1105 to a booster or gathering pump expected to remain in place for a long or an indefinite period outby a working section or sections.

Respondent further argues that the Manual definition of "permanent" violates the Administrative Procedure Act (5 U.S.C. § 553). Section 101(a) of the 1977 Mine Act (30 U.S.C. § 811(a)) requires all rules concerning mandatory health or safety standards to be promulgated in accordance with § 553 of the A.P.A. Further, § 101(a)(2) requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation. Therefore, there would be a violation of the A.P.A. if the Manual policy were more than an interpretation or general statement of policy. However, I find that the Manual definition is a general policy statement of MSHA's interpretation of "permanent." It is not subject to the A.P.A.'s notice and comment requirements.

Respondent also contends that the conflicting enforcement policies of MSHA's District (Morgantown) and Subdistrict (Fairmont) Offices will result in a denial of due process if MSHA is permitted to charge a violation in these cases.

It is clear from the record that it is MSHA's official policy to follow the Manual definition of permanent electrical installations in determining whether a particular pump is "permanent." This approach is followed by the Morgantown District Office, as stated by Inspector John Paul Phillips and Electrical Supervisor Mike Hall. In addition, Gene Fuller, Safety Specialist from the MSHA National Office, testified that this is a nationwide enforcement policy.